Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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SUPREME COURT, U.S.

No. 82-5280

ROBERT WILLIAM STRICKLAND,

Petitioner,

v.

WALTER D. ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

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The State trial court's charge to the jury at the guilt/innocence phase of Petitioner's trial violated Petitioner's Fourteenth Amendment right to Due Process of law in that it created an improper presumption and relieved the State of the burden of proof of intent, an essential element of the offense of murder under Georgia law.

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No. 82-

ROBERT WILLIAM STRICKLAND,

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v.

WALTER D. ZANT, Warden,

Georgia Diagnostic Center,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

Petitioner, Robert William Strickland, prays that a writ of certiorari be issued to review the judgment of the Superior Court of Butts County, Georgia, entered on April 5, 1982. Application for certificate of probable cause to appeal was denied by the Supreme Court of Georgia on May 25, 1982.

CITATIONS TO OPINIONS BELOW

Application for certificate of probable cause to appeal was denied by the Supreme Court of Georgia on May 25, 1982. The order of the Supreme Court of Georgia and the unreported opinion of the Superior Court of Butts County are set out in Appendices A and B respectively.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3), Petitioner having asserted below and asserts in this Court deprivation of rights secured by the Constitution of the United States.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves the following provisions of the Code of Georgia, the texts of which are set out in Appendix C hereto:

Georgia Code Ann. §26-1101

Georgia Code Ann. §50-127

QUESTION PRESENTED

Whether the state trial court's charge to the jury at the guilt/innocence phase of Petitioner's trial violated Petitioner's Fourteenth Amendment right to due process of law in that it created an improper presumption and relieved the State of the burden of proof of intent, an essential element under Georgia law of the offense of murder.

HOW THE ISSUE WAS RAISED BELOW

Petitioner's state Petition for Writ of Habeas Corpus filed in the Superior Court of Butts County, Georgia, pursuant to Ga. Code Ann.§50-127 raised the constitutional issue addressed in this petition. The habeas corpus court considered the merits of

the issue and found against Petitioner. The constitutional issue was raised again on application for certificate of probable cause to appeal in the Supreme Court of Georgia which denied the application.

STATEMENT OF THE CASE

Petitioner Robert Strickland was convicted on June 25, 1980 in the Superior Court of Hall County, Georgia, of three (3) counts of murder and three (3) counts of aggravated assault. He received the death penalty on each of the three counts of murder, and consecutive ten (10) year sentences on each of the three counts of aggravated assault. The judgment of the trial court was affirmed by the Supreme Court of Georgia. Strickland v.State, 247 Ga. 219, 275 S.E.2d 29 (1981). Certiorari was denied by this Court, Strickland v. Georgia, __ U.S. __, 102 S.Ct. 365 (1981).

On November 30, 1981, Petitioner filed a petition for writ of habeas corpus in the Superior Court of Butts County, Georgia; that petition was amended on December 7, 1981. The petition for writ of habeas corpus was denied on April 5, 1982. An application for certificate of probable cause to appeal was denied by the Supreme Court of Georgia on May 25, 1982.

REASON FOR GRANTING THE WRIT

THE STATE TRIAL COURT'S CHARGE TO THE JURY AT THE GUILT/INNOCENCE PHASE OF PETITIONER'S TRIAL VIOLATED PETITIONER'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW IN THAT IT CREATED AN IMPROPER PRESUMPTION AND RELIEVED THE STATE OF THE BURDEN OF PROOF OF INTENT AN ESSENTIAL ELEMENT OF THE OFFENSE OF MURDER UNDER GEORGIA LAW.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that the State, in a criminal prosecution, must prove beyond a reasonable doubt every element necessary to constitute the crime charged. In re Winship, 397 U.S. 358 (1970); Patterson v. New York, 432 U.S. 197 (1977). Under Georgia law, intent is an essential element of the crime of murder. Ga. Code Ann. §26-1101; Davis v. State, 237 Ga. 279, 227 S.E.2d 249 (1976).

The critical portion of the jury charge given at the guilt/innocence phase of Petitioner's trial, concerning the essential element of intent was as follows:

> Now, a crime, under the laws of our State, is a violation of the statute or statutes of this State in which there is union or joint operation of both intention to commit the crime and some act done in furtherance of that intention.
>
> I charge you that every person is presumed to be of sound mind and discretion, but that this presumption may be rebutted. I charge you that you may infer that the acts of a person of sound mind and discretion are the product of his will, and you may infer that a person of sound mind and discretion intends the natural and probable consequences of his act. Now, whether or not you make any such inference is a matter solely within the discretion of the jury. (T.Trial at p. 1047).

Since intent is an element of the offense of murder, "it follows that the trial court may not withdraw or prejudice the issue by instruction that the law raises a presumption of

intent from an act." Morisette v. United States, 342 U.S. 246, 274 (1952); See also, United States v. United States Gypsum, 438 U.S. 422 (1978). A jury instruction is invalid when it creates a presumption which acts to shift the burden of persuasion of an element of the crime away from the prosecution and acts to place the burden of disproof of the element upon the accused. Mullaney v. Wilbur, 421 U.S. 685 (1975); Sandstrom v. Montana, 442 U.S. 510 (1979).

In Sandstrom v. Montana, supra, the Court found defective a jury charge that "the law presumes that a person intends the ordinary consequences of his voluntary acts," 442 U.S. at 513, in that it violated the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt.

The issue of Petitioner's intent was seriously in dispute at Petitioner's state court trial. From the outset, Petitioner's trial counsel recognized Petitioner's severe mental illness as the overriding issue in the case.

Trial counsel had known Petitioner for a period of twenty (20) years prior to his appointment as Petitioner's trial counsel; throughout this time, Petitioner had suffered from mental illness (T. Habeas Corpus 23-24). Trial counsel's representation of Petitioner began on the day after Petitioner's arrest. At this first conference, it became apparent to Petitioner's trial counsel, that due to Petitioner's mental illness, Petitioner did not even know why he was under arrest. (T. Trial 330-332).

Petitioner was at no time able to communicate rationally with his attorney and was not able to assist in anyway in preparing his defense (T. Trial 326-329).

All four (4) psychiatrists who examined Petitioner prior to trial (including two state appointed psychiatrists),

found him to be suffering from serious mental illness.

Expert witness, Dr. Alfred Agrin, diagnosed Petitioner as suffering from schizophrenia, chronic indifferent type. Dr. Agrin had been treating Petitioner for over four years prior to Petitioner's commission of the offenses involved in this case. [1] (T. Trial 944-945).

Dr. Agrin testified that Petitioner suffered from irrational and disorganized thoughts, delusions, and hallucinations. Petitioner suffered from irrational, extreme thoughts of violence with homicidal and suicidal impulses. (T. Trial 945).

Expert witness, Dr. James Harvey Beall, Jr., also diagnosed Petitioner as suffering from psychosis, probably schizophrenia. (T. Trial 965). Dr. Beall had begun treating Petitioner over a year prior to the offense (T. Trial 965).

Dr. Beall testified that Petitioner was delusional, and that Petitioner felt he was being pursued by the C.I.A.; Petitioner was fearful that he was being drugged or poisoned by the C.I.A.. (T. Trial 977). Petitioner also suffered from delusional thoughts concerning religion and was frightened by the devil. (T. Trial 977-978).

Expert witness, Dr. Edward Matthew Eichler, examined Petitioner pursuant to an order of the trial court (T. Trial 994). Dr. Eichler found Petitioner to suffer from extreme mental disorder, possibly schizophrenia. (T. Trial 995). Petitioner was psychotic and in need of treatment. (T. Trial 995).

Dr. Eichler further testified that Petitoner's consciousness was probably completely clouded over by his psychotic rage. (T. Trial 997). Dr. Eichler also testified concerning Petitioner's delusion that he was being pursued by the

---

[1] Petitioner had absolutely no prior criminal record. (T. Trial 1029).

C.I.A. (T. Trial 999).

Expert witness, Dr. Ilhan Ermutlu, examined Petitioner pursuant to an order of the trial court (T Trial 1030). Dr. Ermutlu, although making no specific diagnosis, testified that Petitioner suffered severe emotional disorder.

The evidence of Petitioner's mental disorders clearly placed into issue Petitioner's ability to formulate the requisute intent. The trial court's jury instruction creating a presumption of intent relieved the State of its burden to prove this essential element.

The state habeas corpus court found no constitutional error in the trial court's instruction to the jury because the jury was "told the presumption could be rebutted." (Order, Habeas Corpus, Appendix B at p. 15).

The fact that the jury in Petitioner's case was instructed that the presumption of intent may be rebutted does not affect the invalidity of the charge. Although the state court may be the final authority on the legal effect of a presumption in the state, the state court is, "not the final authority on the interpretation which a jury could have given the instruction." Sandstrom v. Montana, supra, 442 U.S. at 516-517.

In Sandstrom v. Montana, supra, this court found that given the common definition of "presume" as "to suppose to be true without proof", and given the lack of any qualifying instructions by the trial court as to the legal effect of the presumption as given, there was a possibility that the jury may have interpreted the instruction in either of two ways:

> First, a reasonable jury could well have interpreted the presumption as 'conclusive', that is, not technically as a presumption at all, but rather as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption. Alternatively, the jury may have interpreted the instruction as a direction to find intent upon proof of the defendant's

> voluntary actions (and their 'ordinary' consequences), unless the defendant proved the contrary by some quantum of proof which may well have been considered greater than 'some' evidence -- thus effectively shifting the burden of persuasion on the element of intent.
> 444 U.S. at 517 (emphasis in original).

In Petitioner's case, as in Sandstrom, the trial court gave no guidance on how the rebuttal of the presumption of intent could be accomplished or what quantum of proof by Petitioner was necessary to accomplish the rebuttal. In Petitioner's case, as in Sandstrom, a reasonable jury may have given the instruction an unconstitutional effect.

WHEREFORE, for the reasons shown, a writ of certiorari should issue to review the judgment and opinion of the Superior Court of Butts County, Georgia.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-

ROBERT WILLIAM STRICKLAND,

Petitioner,

v.

WALTER D. ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

Application No. 2065

SUPREME COURT OF GEORGIA

ATLANTA, May 25, 1982

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

ROBERT WILLIAM STRICKLAND V. WALTER D. ZANT, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk.

Appendix A

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

ROBERT WILLIAM STRICKLAND,	:	
	:	
PETITIONER	:	
	:	
VS.	:	HABEAS CORPUS
	:	FILE NO. 5353
WALTER D. ZANT,	:	
WARDEN, GEORGIA	:	
DIAGNOSTIC AND	:	
CLASSIFICATION CENTER,	:	
	:	
RESPONDENT	:	

O R D E R

This habeas corpus challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Hall County. Petitioner was convicted of three counts of murder and three counts of aggravated assault. He was sentenced to death for each of the three murders and to consecutive ten year sentences for the three aggravated assaults. His convictions and sentences were affirmed by the Supreme Court. Strickland v. State, 247 Ga. 219 (1981). Certiorari was denied by the Supreme Court of the United States.

The petition, as amended, contains 48 numbered paragraphs, of which 34 allege substantive claims for relief. (11-18, 23-48). The Court will address these claims for relief by paragraphs corresponding numerically to the paragraphs in the petition.

Appendix B

FILED Apr. 5 1982 at 11:00 A M
Audrey S. Hall CHIEF DEP. CLERK

The record in this case consists of the transcript of proceedings before this Court on February 16, 1982; the affidavits of Edward M. Eichler, Ph.D.; Dr. Ilhan Ermutlu; Cardy Mae Pass; Ora Bell Chambers; Clifford John Strickland; Aaron Charles Sutton; Jessie May Cato; Clarence Strickland; Clarence W. Pass; Maudine Tanner; and Roy Lee Maney; and the record and transcript of Petitioner's trial in the Hall Superior Court.

11-15

In paragraphs 11-15, Petitioner alleges that the actions of the trial court in ordering Petitioner to undergo a psychiatric examination violated his Fifth Amendment rights. Specifically, Petitioner complains of the denial by the trial court of defense counsel's request to be present during the exam and the omission of Miranda warnings prior to the exam.

FINDINGS OF FACT

The Supreme Court has already decided that the psychiatric exam was not a "critical stage" of the proceedings so that no error was committed by denying counsel's request to be present. Strickland v. State, supra at 220(1).

Defense counsel had filed a special plea of insanity on January 21, 1980. (R. 17). At the motion hearing on March 10, 1980, Counsel indicated that he had agreed to a psychiatric evaluation of

Petitioner with the restriction that Counsel be allowed to be present during the evaluation. (T. 5). The psychiatrist who was to perform the evaluation testified that he preferred to conduct the exam without either side being present. (T. 10-14). The trial court ordered the evaluation to be conducted privately. (T. 15-21).

The psychiatrist and psychologist who evaluated Petitioner testified that Petitioner was incompetent to stand trial during the special plea trial. (T. 198; 304). They also testified in Petitioner's behalf during the guilt/innocence phase of trial. (T. 993, 1029).

CONCLUSIONS OF LAW

Petitioner relies upon Estelle v. Smith, ____ U.S.____, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), to assert that the denial of Counsel during the exam and the absence of Miranda warnings prior to the exam violated his Fifth and Sixth Amendment rights.

In Estelle, the defendant in a capital murder trial had been ordered by the trial court to undergo a psychiatric examination. Defense counsel had not been notified in advance that the exam would encompass the issue of the defendant's future dangerousness, one of three critical issues in determining whether a death sentence would be imposed, so that the defendant was unable to confer with his attorney on the matter. The Court held that the prosecution's

use of the psychiatrist's testimony in the sentencing phase of trial to establish the defendant's future dangerousness violated his privilege against self-incrimination and right to counsel.

Estelle is readily distinguished from Petitioner's case. Contrary to the facts in Estelle, Petitioner raised the issue of his competency and requested an evaluation. (H.T. 26). Petitioner was not denied the opportunity to confer with his attorney prior to the examination as was the defendant in Estelle. Neither was Petitioner's right to assistance of counsel violated by the denial of defense counsel's request to be present during the evaluation. Estelle did not hold that a defendant is entitled to have his lawyer present during a psychiatric exam. See Estelle v. Smith, supra, 68 L.Ed.2d at 374 n. 14. Secondly, the results of the competency evaluation were not used against Petitioner by the prosecution. Rather, Petitioner introduced the results of the evaluation in the trial on the special plea and called the members of the evaluation team as defense witnesses during the case-in-chief. Petitioner has not shown that his psychiatric evaluation exceeded a routine inquiry into competency or that he was compelled to be a witness against himself.

Accordingly, this claim for relief is found to be without merit.

16-26

In paragraphs 11-26, Petitioner claims he was denied his right to effective assistance of counsel as guaranteed by the Sixth Amendment and the Georgia Constitution.

FINDINGS OF FACT

Petitioner was represented at trial and on appeal by John N. Crudup, an attorney in Gainesville, Georgia. (H.T. 22, 38). Counsel has practiced law for 27 years and has handled "thousands" of criminal cases. He estimated that he has represented defendants in 3 dozen capital felony cases. This was the first death penalty case he has lost. He has also represented defendants in many non-capital murder cases.

Counsel testified that Petitioner first called him after the incident. (H.T. 23). Counsel saw Petitioner but said the meeting was futile because Petitioner did not know why he was in jail. Id. Within two or three weeks Counsel was appointed to represent Petitioner. Id.

Counsel testified that it was obvious to him that Petitioner would need a psychiatric examination because Counsel had known of Petitioner's mental condition from its inception. (H.T. 23-24). Counsel filed a special plea of insanity. (R. 17-19). He moved for a psychiatric examination of Petitioner, and the motion was granted. (H.T. 26).

Counsel testified that the trial judge refused to recognize the contents of the psychiatric report and ordered Petitioner to stand trial on the special plea. (H.T. 29). The Supreme Court has found that the report did not unequivocally declare Petitioner incompetent to stand trial. Strickland v. State, supra at 220(2). See Report of the Forensic Team, p. 3, par. 5.

At the trial on the special plea of insanity, Counsel made an opening statement though it was not recorded (T. 184); presented seven witnesses, including the two Forensic Team members and Counsel himself (T. 185; 209; 259; 274; 283; 298; 325); moved for a directed verdict in his favor (T. 258); cross-examined State's witnesses (T. 358; 373; 392); and gave a closing argument though it was unrecorded (T. 423). The jury returned a verdict against Petitioner's special plea of insanity. (R. 54).

Counsel testified that the jury that witnessed Petitioner's outburst was the sentencing jury. (H.T. 33-34). Petitioner's outbursts (T. 228; 406) occurred during the trial on the special plea (T. 49-430). (See List of Trial Jurors on Special Plea of Insanity, R. 53; List of Trial Jurors, R. 74).

At the main trial, Counsel reserved his opening statement (T. 644); cross-examined State's witnesses (T. 666; 687; 690; 736; 752; 807; 825; 847; 882; 942; 1014); made motions (T. 731; 746; 1113; 1120; 1123; 1124); presented seven witnesses in Petitioner's behalf

during the guilt/innocence phase, including three psychiatrists and one psychologist (T. 913; 929; 943; 963; 993; 1004; 1029); gave closing argument in the guilt/innocence phase (T. 1050-1067); relied on the evidence already presented for the sentencing phase (T. 1128); and gave closing argument during the sentencing phase. (T. 1147-1151).

CONCLUSIONS OF LAW

The Sixth Amendment right to counsel means "...not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960); Pitts v. Glass, 231 Ga. 638 (1974).

Counsel here easily meets the test. He was experienced in the trial of criminal cases. He prepared for and advocated Petitioner's cause in a reasonably effective manner. The effort he put forth was certainly reasonably effective within the meaning of the standard.

Petitioner has claimed that Counsel was ineffective for failing to call Charles Sutton. Petitoner claims, on the basis of Sutton's affidavit, that Sutton had the most contact with Petitioner while he was incarcerated and could have tipped the balance in Petitioner's favor.

The record reflects that Counsel vigorously pursued the matter of the special plea. At the trial on the special plea, Counsel presented

seven witnesses, including the two members of the Forensic Services Team. The Court finds it highly speculative whether the testimony of Sutton would have made any difference in the jury's verdict on the special plea and does not find Counsel ineffective for this reason.

Petitioner has also claimed that Counsel was ineffective in failing to present any witnesses in mitigation during the sentencing phase. Petitioner has presented ten affidavits of family, friends, and Drs. Ermutlu and Eichler of the Forensic Team (some of whom testified at trial) in support of his claim that mitigating evidence was available but not investigated or presented.

During the guilt/innocence phase Counsel presented seven witnesses: three family members (T. 913; 929; 1004); two psychiatrists who had previously treated Petitioner (T. 943; 963); and the psychiatrist and psychologist of the Forensic Services Team who had conducted the court-ordered evaluation of Petitioner (T. 993; 1029). These witnesses testified at length as to Petitioner's background and mental condition. Counsel did attempt to recall the Forensic Team members as witnesses for the sentencing phase. (See paragraphs 31-34).

Decisions on which witnesses to call are the exclusive province of the lawyer after consultation with his client. Reid v. State, 235 Ga. 378 (1975).

Given the prior testimony of the witnesses in the guilt/innocence phase, the Court cannot conclude Counsel was ineffective for not presenting them in the sentencing phase. Effectiveness is not measured by how another lawyer might have handled the case. Estes v. Perkins, 225 Ga. 268 (1968).

Accordingly, the claim for relief in paragraphs 16-26 is found to be without merit.

27-28

The Supreme Court has already concluded that the "death penalty opposition responses of the venire persons who were excused for cause met the requirements of Witherspoon v. Illinois, 391 U.S. 510 (88 S.C. 1770, 20 L.Ed.2d 776) (1967)...." Strickland v. State, supra at 227 (29).

29-30

In paragraphs 29-30, Petitioner alleges that the failure of the trial court to direct a verdict in his favor on the special plea of insanity violated his Fifth, Sixth, Eighth and Fourteenth Amendment rights.

FINDINGS OF FACT

The Supreme Court has already decided this issue adversely to Petitioner. Strickland v. State, supra, at 220(3).

CONCLUSIONS OF LAW

Findings of the Supreme Court are binding upon

this Court for the purposes of review. Elrod v. Ault, 231 Ga. 750 (1974).

Petitioner has claimed that his evidence unequivocally showed that he was incompetent to stand trial and that the Supreme Court, in passing upon this issue, took a statement out of context to find that an issue of fact as to Petitioner's competency had been created. (H.T. 30, 38). However, a reading of the transcript of Petitioner's trial on his special plea, (T. 49-430), indicates otherwise.

Petitioner's own witness, Dr. Ermutlu, testified as to the results of his evaluation of Petitioner, and the statement of which Petitioner complains was a part of Dr. Ermutlu's findings. (T. 195-196). Subsequent responses by the psychiatrist indicated that Petitioner's intellectual level was sufficient to understand the charges against him and that Petitioner had the capacity to relate. (T. 197). Dr. Ermutlu also testified that Petitioner had told the psychiatrist of his attempt to commit suicide while he was in jail. (T. 202). Dr. Ermutlu relayed this to Dr. Eichler, and they agreed that Petitioner was suicidal upon the basis of this incident and previous attempts. (T. 317-318).

The State presented seven witnesses at the competency hearing. Three witnesses, including the physician who treated Petitioner in the emergency room, testified about Petitioner's alleged suicide

attempt at the jail. (T. 350; 353; 360). The physician found no evidence of pills Petitioner claimed to have taken. (T. 359). The jailer, who is qualified to give his lay opinion as to competency[1] testified that in his opinion Petitioner was feigning incompetency. (T. 365). One law enforcement officer testified as to his contact with Petitioner the night of the incident. (T. 379).

Thus, the State presented ample evidence to rebut Petitioner's evidence and create an issue of fact as to Petitioner's competency to stand trial. Petitioner has not shown the Supreme Court's holding was in error.

Accordingly, this allegation is found to be without merit.

31-34

In paragraphs 31-34, Petitioner alleges that he was denied the right to present evidence of his mental condition in the sentencing phase in violation of his constitutional rights. Specifically, he claims he was denied (1) an examination by an independent psychiatrist or a re-evaluation by the Forensic Services Team; (2) the right to re-subpoena the two Team members for the sentencing phase; and, (3) the opportunity to introduce into evidence the Forensic Team report of Petitioner's evaluation.

FINDINGS OF FACT

During the guilt/innocence phase of trial, two

[1] Lingo v. State, 224 Ga. 333, 342 (1968); Dix v. State, 238 Ga. 209(2)(1977).

psychiatrists who had previously treated Petitioner (T. 943; 963) as well as Drs. Eichler and Ermutlu of the Forensic Services Team (T. 993; 1029) were among the witnesses testifying in support of Petitioner's insanity defense. (H.T. 39).

The Supreme Court has already concluded that Petitioner's second allegation lacked "a factual foundation in the transcript of proceedings." Strickland v. State, supra at 226(25). The Court held that the trial court's refusal to grant Petitioner a second continuance to have Drs. Ermutlu and Eichler present was no manifest abuse of discretion. Id. (For a factual account of events preceding and occurring during the sentencing phase, see Strickland v. State, supra, at 226(25), and T. 1113-1128).

After the trial court denied defense counsel's request for a psychiatric re-evaluation of Petitioner by the Forensic Team, counsel asked the prosecutor "to stipulate their findings in that evaluation, and simply submit that, in lieu of calling them as a witness." (T. 1119). The prosecutor refused. Id.

CONCLUSIONS OF LAW

The appointment of experts is a matter within the trial court's discretion. Westbrook v. State, 242 Ga. 151 (1978); Crenshaw v. State, 244 Ga. 430 (1979). Petitioner has not shown that any request was ever made for an independent psychiatric exam. Neither

has he shown the trial court abused its discretion in denying his request for a re-evaluation. Thus, Petitioner's first allegation is found to be without merit.

As to Petitioner's second claim that he was denied the right to recall Drs. Ermutlu and Eichler, the Supreme Court has already decided this issue adversely to Petitioner. However, Petitioner charges that the recent decision of Eddings v. Oklahoma, No. 80-5727 (U.S. Jan. 19, 1982), compels this Court to reach a different result.

In Eddings, the defendant in a capital murder case presented testimony about his violent background during the sentencing phase of his trial. The sentencer, a trial judge sitting without a jury, held that as a matter of law he was unable to consider Eddings' background as evidence in mitigation. The Supreme Court noted that, "In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered in his behalf." Eddings, supra (30 Crim. L.Rep. 3047, 3050). The Court held that a sentencer "may determine the weight to be given relevant mitigating evidence," but the sentencer "may not give it no weight by excluding such evidence from their consideration." Id.

Petitioner claims that, as in Eddings, the sentencer was unable to consider evidence offered in mitigation because of the rulings of the trial judge. However, such is not the case. The trial court denied Petitioner a second continuation to have Drs. Ermutlu and Eichler

present, which the Supreme Court found was not an abuse of discretion. Drs. Ermultlu and Eichler had testified at length as to Petitioner's mental condition in support of his insanity defense during the guilt/innocence phase of trial. (T. 993; 1029). Dr. Eichler testified that they had found Petitioner incompetent to stand trial. (T. 995). In addition, two psychiatrists who had previously treated Petitioner testified as to his mental disorders in the guilt/innocence phase. (T. 943; 963). Thus, ample evidence of Petitioner's mental condition was presented to the jury. The trial court's denial of the continuance did not preclude the jury from considering any mitigating evidence.

Finally, Petitioner's allegation that the trial court refused to allow Petitioner to introduce the report of the Forensic Team as mitigating evidence is without a factual basis.

Accordingly, the claims for relief in paragraphs 31-34 are found to be without merit.

35-38

In paragraphs 35-38, Petitioner claims that the jury instruction on intent created an impermissible presumption which relieved the State of its burden of proving an essential element of the offense, thereby violating his right to due process of law.

FINDINGS OF FACT

The trial court charged the jury:

"I charge you that every

person is presumed to be of sound mind and discretion, but this presumption may be rebutted. I charge you that you may infer that the acts of a person of sound mind and discretion are the product of his will, and you may infer that a person of sound mind and discretion intends the natural and probable consequences of his act. Now, whether or not you make any such inference is a matter solely within the discretion of the jury."

(T. 1097).

CONCLUSIONS OF LAW

Petitioner relies upon Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), and the recent decision of Mason v. Balkcom, No. 80-7344 (Former 5th Cir., March 1, 1982), to assert that the charge on intent in this case was impermissibly burden-shifting.

Sandstrom and Mason are readily distinguished upon the ground that in neither case was the jury told that the presumption could be rebutted. Here, the jury was clearly told the presumption could be rebutted. Additionally, the jury in Petitioner's case was told that whether to make any such inference was a matter solely within the jury's discretion. Thus, the presumption created was a permissive one which the jury was free to apply or reject. Ulster County Court v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).

When viewing the charge as a whole, Patterson v. State, 239 Ga. 409, 415 (1977), a reasonable juror could not have interpreted the charge as conclusive or burden-shifting. Ulster County Court v. Allen, supra.

Accordingly, this claim for relief is found to be without merit.

39

In paragraph 39, Petitioner claims his Eighth and Fourteenth Amendment rights were violated by insufficient jury instructions in the sentencing phase of trial. Specifically, he alleges that the charge failed to define statutory aggravating circumstances and mitigating circumstances adequately, failed to explain the weighing of aggravating and mitigating circumstances, and failed to instruct the jury they could recommend life even if they found a statutory aggravating circumstance to exist.

FINDINGS OF FACT

The Court has examined the instructions to the jury in the sentencing phase of Petitioner's trial. (T. 1152-1157).

The Supreme Court has already concluded that the charge was not subject to the defects dealt with in Fleming v. State, 240 Ga. 142 (1978), and Hawes v. State, 240 Ga. 327 (1978).

CONCLUSIONS OF LAW

The trial court defined mitigating circumstances

to the jury and told them they could recommend a life sentence even if they found the existence of one or more aggravating circumstances. Thus, the charge comports with Spivey v. Zant, 661 F.2d 464 (1981).

Accordingly, this allegation is found to be without merit.

40-43

In paragraphs 40-43, Petitioner contends his constitutional rights were violated by the State's use of non-statutory aggravating circumstances.

FINDINGS OF FACT

The Supreme Court has already found that, "No evidence in aggravation was offered by the State during the presentence hearing. Rather, the State relied on evidence submitted during the guilt/innocence phase of the proceedings." Strickland v. State, supra at 226 (24). The Court also found that the State's notice of aggravating circumstances complied with Ga. Code Ann. §27-2503. Id.

CONCLUSIONS OF LAW

Georgia's death penalty statute requires the sentencer to consider "any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence...." Ga. Code Ann. §27-2534.1(b).

The Supreme Court has noted that in the presentence hearing, "all aspects of the crime, the past criminal record or lack therefore, and the defendant's general moral character" are relevant to the trier of fact in determining the sentence to be imposed. Fair v. State, 245 Ga. 868, 873 (1980). "Any lawful evidence which tends to show the motive of the defendant, his lack of remorse, his general moral character, and his predisposition to commit other crimes is admissible in aggravation, subject to the notice provisions of the statute." Id.

Though no evidence in aggravation was introduced by the State in the sentencing phase of trial, Petitioner claims that the State's reliance upon the non-statutory aggravating circumstances and the trial court's charge thereon were unconstitutional.

"In a capital felony presentence trial, the State is not limited to the introduction of evidence to support the particular statutory aggravating circumstances it is relying upon." Fair v. State, supra at 873-874.

Accordingly, the allegation in paragraphs 40-43 is found to be without merit.

44

In paragraph 44, Petitioner contends that the trial court's refusal to charge the jury on the lesser included offense of voluntary manslaughter

deprived him of his Sixth, Eighth, and Fourteenth Amendment rights and corresponding rights under the Georgia Constitution.

FINDINGS OF FACT

The Supreme Court, in passing upon the refusal of the trial court to give specific charges as requested by defense counsel, has already concluded, "There was no factual basis for a charge on voluntary or involuntary manslaughter." Strickland v. State, supra, at 225 (19).

CONCLUSIONS OF LAW

Findings of the Supreme Court are binding upon this Court for the purposes of review. Elrod v. Ault, supra.

Accordingly, this allegation is found to be without merit.

45-47

Petitioner has made no showing that the death penalty is being arbitrarily or discriminatorily applied. Neither has he shown that a lack of theoretical justification for imposing the death penalty exists.

Accordingly, these allegations are found to be without merit.

48

Petitioner's "prosecution-prone" argument

was rejected in Smith v. Balkcom, 660 F.2d 573 (1981).

WHEREFORE, after full consideration of each and every ground offered in support of the petition, the same is hereby denied.

This 2 day of April, 1982.

Alex Crumbley

ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

APPENDIX C

STATUTES INVOLVED

Georgia Code Annotated Section 26-1101

Murder (a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

(c) A person convicted of murder shall be punished by death or by imprisonment for life.

Georgia Code Annotated Section 50-127

Exclusive procedure for suing out a writ of habeas corpus for persons whose liberty is being restrained by virtue of a sentence imposed against them by a State court of record.

Notwithstanding the other provisions of this Title, the following is the exclusive procedure for suing out a writ of habeas corpus for persons whose liberty is being restrained by virtue of a sentence imposed against them by a State court of record:

(1) Grounds for writ.

Any person imprisoned by virtue of a sentence imposed by a State court of record who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Georgia or the laws of the State of Georgia may institute a proceeding under this

section. Except for objections relating to the composition of a grand or traverse jury, rights conferred or secured by the Constitution of the United States shall not be deemed to have been waived unless it is shown that there was an intentional relinquishment or abandonment of a known right or privilege which relinquishment or abandonment was

participated in by the party and was done voluntarily, knowingly, and intelligently. The right to object to the composition of the grand or traverse jury will be deemed waived under this section, unless the person challenging the sentence shows in the petition and satisfies the court that cause exists for his being allowed to pursue the objection after the conviction and sentence has otherwise become final.

(2) Petition and verification.

The petition shall identify the proceeding in which the petitioner was convicted, give the date of rendition of the final judgement complained of, and clearly set forth the respects in which petitioner's rights were violated. The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached. The petition shall identify any previous proceedings that petitioner may have taken to secure relief from conviction. Argument and citations of authorities shall be omitted from the petition. The petition must be verified by the oath of the applicant or some other person in his behalf.

(3) Jurisdiction and venue.

The petition must be filed in the superior court of the county wherein the petitioner is being detained. The superior courts of such counties have exclusive jurisdiction of habeas corpus actions arising under this section.

(4) Service of the petition.

Service of the petition shall be made upon the person having custody of the petitioner. If the petitioner is being detained under the custody of the Board of Corrections, an additional copy of the petition shall be served on the Attorney General; however, if the petitioner is being detained under the custody of some other authority other than the Board of Corrections, an additional copy of the petition shall be served upon the solicitor general of the county wherein the petition is filed. Service upon the Attorney General or the solicitor general may be had by mailing a copy of the petition along with a proper certificate of service.

(5) Custody of petitioner.
Custody and control of petitioner shall be retained by the Board of Corrections or other authority having custody of the petitioner and it shall be the duty of such

board or authority to produce the petitioner at such times and places as the court may direct.

(6) Proceedings on petition.
Within 20 days after filing and docketing of the petition, or within such further time as the court may set, the respondent shall answer or move to dismiss the petition. The court shall set the case for a hearing on the issues within a reasonable time after the filing of defensive pleadings.

(7) Disposition in the trial court.
(a) The court may receive proof by depositions, oral testimony, sworn affidavits, or other evidence.
(b) The taking of depositions upon written questions, by either party, shall be governed by the provisions of sections 81A-127 through 81A-132 and 81-137: Provided, however, that the time allowed in section 81A-131 for service of cross-questions upon all other parties shall be 10 days from the date the notice and written questions are served.

(c) If sworn affidavits are intended by either party to be introduced into evidence, the party intending to introduce the affidavit shall cause it to be served upon the opposing party at least five days in advance of the date set for a hearing in the case. The affidavit so served shall be accompanied by a notice of the party's intention to introduce it into evidence. The superior court judge considering the petition for writ of habeas corpus may resolve the disputed issues of fact upon the basis of sworn affidavits standing by themselves.
(d) If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgement or sentence challenged in the proceeding and such supplementary orders as to rearraignment, retrial, custody, or discharge as may be necessary and proper. In all cases the court shall dispose of the matter as law and justice require.

(8) Transcribing proceedings.
All trials held under this section shall be transcribed by a court reporter designated by the superior court hearing the case.

(9) Judge's findings of fact and conclusions of law.
After reviewing the pleadings and evidence offered at the trial of the case, the judge of the superior court hearing the case shall make written findings of fact and conclusions of law upon which the judgement is based. Such findings of fact and conclusions of law shall be recorded as part of the record of the case.

(10) Subsequent petitions - waiver of grounds not claimed.
All grounds of relief claimed by a petitioner for a writ of habeas corpus shall be raised by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the Constitution of the United States or of the State of Georgia otherwise requires, or any judge to whom the petition is assigned, on considering the subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

(11) Practice as to appeals.
(a) Appeals in habeas corpus cases shall be governed by the Appellate Procedure Act of 1965 [§6-701 et seq], except that as to final orders of the court which are adverse to the petitioner, no appeal shall be allowed unless a justice of the Supreme Court of Georgia shall issue of certificate of probable cause for such appeal.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-5380

RECEIVED
AUG 25 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ROBERT WILLIAM STRICKLAND,

Petitioner,

v.

WALTER D. ZANT, Warden,
Georgia Diagnostic Center,

Respondent

Supreme Court, U.S.
FILED
AUG 23 1982
Alexander L. Stevas, Clerk

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Petitioner, Robert William Strickland, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner's affidavit of indigency is attached to this motion.

Respectfully submitted,

Joseph M. Nursey
Millard C. Farmer
ATTORNEYS FOR PETITIONER

15 Peachtree St., Suite 831
Atlanta, Ga. 30303

(404) 688-8116

ROBERT WILLIAM STRICKLAND,

Petitioner,

v.

WALTER D. ZANT, Warden,

Respondent

AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

RECEIVED
AUG 25 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

I, Robert William Strickland, being first duly sworn, depose and say that I am the Petitioner in the above entitled case; that in support of my motion to proceed without being required to pre-pay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe that I am entitled to redress.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes___ No ✓

   a. If the answer is yes, state the amount of your salary or wages per month, and give the name and address of your employer.

   ---

   b. If the answer is no, state the date of last employment and the amount of the salary and wages per month which you received.

   December 1977 $320 per month

2. Have you received within the past twelve months any money from any of the following sources?

   a. Business, profession or form of self-employment? Yes___ No ✓

   b. Rent payments, interest or dividends? Yes___ No ✓

   c. Pensions, annuities or life insurance payments? Yes___ No ✓

   d. Gifts or inheritances? Yes___ No ✓

   e. Any other sources? Yes___ No ✓

   If the answer to any of the above is yes, describe each source of money and state the amount received from each during the past twelve months.

   ---

3. Do you own any cash, or do you have money in a checking or savings account? Yes ✓ No ____ (Include any funds in prison accounts). If the answer is yes state the total value of the items owned.

$60.00

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ____ No ✓

a. If the answer is yes, describe the property and state its approximate value. ____

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

STATE OF GEORGIA
COUNTY OF BUTTS

Robert William Strickland

Sworn to and subscribed before me this 19th day of August, 1982.

Imozine Crider
NOTARY PUBLIC
My commission expires:

Jan. 14, 1985

CERTIFICATE OF SERVICE

I hereby certify that I have served counsel for the opposing party with a copy of the foregoing pleading by placing same in the United States Mail with adequate first-class postage attached thereon addressed to Mr. Michael J. Bowers, Attorney General, State of Georgia, 132 State Judicial Bldg., 40 Capitol Square, S.W., Atlanta, Georgia 30334.

This 23rd day of August, 1982.

Joseph M. Nursey
COUNSEL FOR PETITIONER
15 Peachtree Street, N.E.
Suite 831
Atlanta, Georgia 30303
(404) 688-8116

ORIGINAL

RECEIVED
SEP 27 1982
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SUPREME COURT, U.S.

NO. 82-5280

IN THE

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OCTOBER TERM, 1982

ROBERT WILLIAM STRICKLAND,

Petitioner,

v.

WALTER D. ZANT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF BUTTS COUNTY

BRIEF IN OPPOSITION FOR THE RESPONDENT

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General

MICHAEL J. BOWERS
Attorney General

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Executive Assistant
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10

QUESTION PRESENTED

1.

Whether the trial court's instructions to the jury at the guilt/innocence phase of Petitioner's trial created an improper presumption and shifted the burden of proof of intent from the State.

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NO. 82-5280

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OCTOBER TERM, 1982

ROBERT WILLIAM STRICKLAND,

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WALTER D. ZANT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF BUTTS COUNTY

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, Robert William Strickland, was indicted in Hall County, Georgia, for the murders of Eddie Lee Carroll, Lester Lee Carroll and Bonnie Mae Carroll and for aggravated assaults upon Junie Irene Carroll, Elizabeth June Carroll and Cecil Carroll. At Petitioner's trial in 1980, Petitioner was tried by a jury and found guilty of all offenses. Petitioner

was sentenced to death for each of the three murders and to consecutive ten year sentences for the three aggravated assaults. The death penalties were imposed upon a finding of Ga. Code Ann. § 27-2534.1(b)(2) in two of the murders and Ga. Code Ann. § 27-2534.1(b)(7) in one of the murders.

On direct appeal to the Georgia Supreme Court, Petitioner's convictions were confirmed. Strickland v. State, 247 Ga. 219, 275 S.E.2d 29 (1981). Thereafter, on March 30, 1981, Petitioner's Motion for a Rehearing was denied.

On October 5, 1981, this Court denied Petitioner's petition for a writ of certiorari, and on November 30, 1981, this Court denied Petitioner's petition for rehearing.

A petition for a writ of habeas corpus was filed in the Butts County Superior Court and a hearing was held on February 16, 1982. By Order dated April 2, 1982, the Butts County Superior Court denied state habeas relief. The Georgia Supreme Court denied Petitioner's Application for a Certificate of Probable Cause to Appeal on May 25, 1982. Thereafter, Petitioner filed this second petition for a writ of certiorari.

The facts which gave rise to Petitioner's convictions are succintly set forth in Strickland v. State, supra, and because the underlying facts of Petitioner's conviction have no direct bearing upon the legal issues presented on this application for a writ of certiorari, they will not be repeated herein.

PART TWO

REASON FOR NOT GRANTING THE WRIT

ARGUMENT AND CITATION OF AUTHORITY

I. THE TRIAL COURT'S CHARGE ON INTENT WAS NOT IMPERMISSIBLY BURDEN-SHIFTING.

Petitioner alleges that the trial court's charge to the jury during the guilt/innocence phase of Petitioner's trial created an unconstitutional presumption and shifted the burden of proof from the State to the Petitioner.

The charge about which Petitioner complains was given as follows:

> Now, a crime, under the laws of our State, is a violation of the statute or statutes of this State in which there is a union or joint operation of both intention to commit the crime and some act done in furtherance of that intention.
>
> I charge you that every person is presumed to be of sound mind and discretion, but that this presumption may be rebutted. I charge you that you may infer that the acts of a person of sound mind and discretion are the product of his will, and you may infer that a person of sound mind and discretion intends the natural and probable consequences

of his act. Now, whether or not you make any such inference is a matter solely within the discretion of the jury.

(Trial Transcript, Vol. V; p. 1097).

Petitioner contends that these instructions placed upon him the burden of proof on the element of intent and thus violated the principles set forth in Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1978). In Sandstrom v. Montana, supra, et seq. at 514, citing Ulster County Court v. Allen, 442 U.S. 140 (1979), the United States Supreme Court stated that the threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes. The Supreme Court in Ulster County Court distinguished between permissive presumptions or inferences and mandatory presumptions, noting that a permissive presumption or inference "allows but does not require the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one . . . and places no burden of any kind on the defendant." Ulster County Court, supra, 157. On the other hand, mandatory presumptions tell "the trier of fact that he or they must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection

between the two facts." Id., at 157.

Respondent submits that the instructions in the instant case are neither conclusive nor burden-shifting. The charge allows, but does not require, the jury to infer or presume certain facts once the State has proven other basic facts. The Court in very clear language informed the jury that this presumption was rebuttable. The Court went on to charge that criminal intention would not be presumed, and of course, the jury was clearly instructed that the burden of proof was on the State to prove intent as an essential element of the crime.

As the charge merely creates a permissive presumption, Petitioner must demonstrate that the instruction is invalid as it applies to him. He must show that there is no rational way a trier of fact can make the particular connection allowed by the inference. Ulster County Court, supra, at 157. As no such showing has been made in the instant case, the charge was clearly correct as applied to Petitioner.

Respondent asserts that when the charge is considered as a whole, as is required by Cupp v. Naughten, 414 U.S. 141 (1973), reasonable jurors would not have interpreted the presumption as being conclusive or as shifting the burden of persuasion to the Petitioner. Respondent submits that the trial court's instructions clearly created only, at the most, a permissive inference similar to the charge considered by the Court in the Ulster County Court, supra.

CONCLUSION

For all of the above and foregoing reasons, Respondent respectfully requests this Court to deny Petitioner's request for a writ of certiorari.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

MARION O. GORDON
Senior Assistant
Attorney General

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General

VIRGINIA H. JEFFRIES
Staff Assistant
Attorney General

Please serve:

VIRGINIA H. JEFFRIES
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3359

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon to:

Mr. Joseph M. Nursey
15 Peachtree Street, N.E.
Suite 831
Atlanta, Georgia 30303

This 24th day of September, 1982.

Virginia H. Jeffries
VIRGINIA H. JEFFRIES